

NTSB Order No. EA-4004

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 19th day of October, 1993

Docket SE-13283

6181

grant the motion.

The record establishes that respondent on September 17, 1993 filed a timely notice of appeal from the oral initial decision the law judge rendered on September 16.² However, respondent did not file an appeal brief until September 23, one day past the five day filing deadline. In response to the motion to dismiss, the respondent, by counsel, suggests that he believed he had an additional day to file an appeal brief because he had filed the notice of appeal a day early. We find no justification for respondent's error, for the applicable rule clearly states that the time for filing an appeal brief is five days after the notice of appeal is filed, not five days after the last day it could have been filed. Thus, whether viewed as an error of computation (see, e.g., Administrator v. Royal American Airways, Inc., 5 NTSB 1089 (1986)(late notice of appeal), aff'd Royal American Airways, Inc. v. FAA, 9th Cir., No. 86-7512, April 29, 1987 and Administrator v. Beavers, NTSB Order EA-3359 (1991)(late appeal brief)) or of construction (see, e.g., Administrator v. Near, 5 NTSB 994 (1986)(Unfounded mistake as to filing requirement does not constitute good cause)), it does not appear that the lateness of the brief is excusable for good cause shown.

In the absence of good cause for respondent's noncompliance with the time limit for filing an appeal brief, dismissal of his appeal is required by Board precedent. See Administrator v. Hooper, NTSB Order No. EA-2781 (1988); Administrator v. Kalko, NTSB Order No. EA-3984 (served September 29, 1993).³
(..continued)

party who has filed a notice of appeal fails to perfect his appeal by filing a timely brief...."

²The law judge affirmed an emergency order of the Administrator revoking the respondent's commercial pilot certificate (No. 461458783) for his alleged violations of sections 91.409(a)(1), 91.413, 91.207(c), 91.7(a), 91.123(a), 91.13(a), and 45.21(b) of the Federal Aviation Regulations, 14 CFR Parts 91 and 45.

³The Administrator has moved to amend his motion to dismiss in order to include a request that we overturn a procedural ruling in Administrator v. Ben-Hanania, NTSB Order No. EA-3540 (1992), a case the Administrator suggests could be viewed as inconsistent with the strict policy on dismissals set forth in Hooper. In Ben-Hanania we reached the merits of and *denied* an appeal whose appeal brief may have been filed late because we could "not tell from the record whether there [was] good cause to excuse the tardiness," and where, we believed, "the time constraints applicable to an emergency proceeding preclude[d] us...from ascertaining the answer to that question" (Id. at page 2, n. 4). We will grant the amendment, but see no need to overrule Ben-Hanania, for that case does not represent any

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's motion to dismiss is granted, and
2. The respondent's appeal is dismissed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above order.

(..continued)

departure from the dictates of Hooper, nor was it intended to. To the contrary, our ruling on the merits there was simply an attempt to avoid what might have been an erroneous procedural ruling that might have impaired our ability to enter a timely final decision. Our ruling in Ben-Hanania should not be construed as reflecting any willingness by the Board to *grant* an emergency appeal absent a showing of good cause for any notice of appeal or appeal brief that may have been filed out of time.